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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 206 67

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

CLAUDE A. ROTH,
Attorney for Petitioners.

CUMMINGS AND STANLEY,
DAVID L. BAZELON,
JACK H. OPPENHEIM,
JACK JACOBS,
Of Counsel.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, THOMAS PAPER STOCK COMPANY, a corporation, and ALVIN E. SANDROFF, petition this Court for a writ of certiorari to review a judgment of the United States Emergency Court of Appeals dismissing petitioners' complaint there, and in support of this petition respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

By the decision of the Emergency Court of Appeals, petitioners may be forced to trial as defendants in a criminal case, *under a price regulation which did not become valid until after the dates of violations alleged in the indictment.* The right accorded by the Emergency Price Control Act to have the regulation declared invalid, by means of the statutory protest procedure, has been cut off arbitrarily through a construction of the statute, which, in the language of the dissenting opinion of Judge Laws, *completely obstructs the right of judicial review.*

On June 15, 1944, petitioners filed a protest with the Price Administrator, pursuant to the provisions of § 203 of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. App. § 923, against Maximum Price Regulation No. 30, Wastepaper, 7 Fed. Reg. 9732, 8 Fed. Reg. 17483. Their protest was denied on July 29, 1944, and on August 26, 1944 they filed a complaint in the Emergency Court of Appeals pursuant to the provisions of § 204 (a) of the Act, 50 U. S. C. App. §924 (a).

On December 17, 1943, petitioners had been indicted in the United States District Court for the Northern District of Illinois for alleged violations of MPR 30. On June 29, 1944, the Price Administrator instituted against petitioners, in the same court, a civil action for treble damages and an injunction. Both proceedings involved sales of unsorted wastepaper alleged to have been made between July 16 and September 11, 1943, at more than the

maximum price fixed by MPR 30. Both proceedings are still pending.

Subsection (d) of § 1347.14 of the Regulation established ceiling prices on unsorted wastepaper. It is this provision of the Regulation to which petitioners' protest was directed. Section 1347.14 (d) reads:

> "The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for 'No. 1 mixed paper,' regardless of the grades and quantity of each grade contained in such unsorted wastepaper."

One of the grounds of the protest was that the subsection fixed the maximum price for a category of wastepaper, unsorted wastepaper, in terms of a specification or standard, "No. 1 mixed paper", and that for this reason the subsection ran afoul of § 2 (j) of the Act, known as the Taft amendment, 50 U. S. C. App., § 902, enacted July 16, 1943, from the latter date until September 11, 1943. Subsection (j) reads as follows:

> "(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

The administrative determination required by subdivision (3) of the Taft amendment to be made before the commodity in question could be standardized, was not made until September 11, 1943.

The period between the date of the enactment of the Taft amendment, and the date on which the Price Administrator first determined that the standardization of unsorted wastepaper in terms of the standard, "No. 1 mixed paper", was essential for securing effective price control with respect to such commodity, is the period during which petitioners are alleged in the pending enforcement proceedings to have violated the Regulation.

On March 27, 1945, the Emergency Court of Appeals dismissed petitioners' complaint (Judge Laws dissenting) without determining the merits of the question thus raised. The ground assigned for dismissal was that the objection was not available to or properly included by petitioners in their protest to the Administrator because on the date the protest was filed, June 15, 1944, the Regulation was not open to the objection sought to be raised, since the asserted ground of invalidity no longer existed, the defect in the Regulation having been "corrected and cured" by the Administrator on September 11, 1943, when he first made the determination that there was no practicable alternative to standardization.

The reasoning of the majority opinion of the Emergency Court of Appeals is that the primary purpose of the protest proceeding is to afford prospective relief against control imposed upon prices; that while in some cases the Administrator may grant retroactive relief, such relief is purely incidental, and the Act does not contemplate that the Administrator "may be wholly diverted from his all important administrative task of price control for the sole purpose of performing the unrelated judicial task of determining the effect of past regulations

upon the rights and liabilities of private individuals". The right to claim this so-called "incidental" relief is recognized by the Court if at the time the protest was filed the Regulation was open to the objections raised. However, this right apparently is held to be cut off if the Administrator removes the basis of objection before a protest is filed, notwithstanding that no time limitation was imposed by the language of the Act with respect to the filing of a protest such as the one in question, which was based upon new grounds arising after the issuance of the Regulation (*R. E. Schanzer, Inc.* v. *Bowles*, 141 F. 2d 262), and notwithstanding that the Administrator had, subsequent to validating the Regulation, caused the indictment of persons whose alleged violations occurred prior to such validation. It was further held by the Court that because the objection was "not timely presented to the Administrator", it could not be considered by the Court, since § 204 (a) of the Act[1] provides that the Emergency Court of Appeals may not consider any objection

1. Section 204 (a) of the Act reads as follows:

"Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: Provided, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be con-

urged in support of the complaint unless the objection was set forth by the complainant in the protest.

The Court in its opinion suggested that petitioners have not necessarily lost the possibility of securing retroactive relief, since the Stabilization Extension Act of 1944, 58 Stat. 639, by its addition of subsection (e) to § 204 of the original Act, 50 U. S. C. § 924 (e), now affords a remedy to a person who has excusably failed to present an objection to a Regulation by way of protest while the Regulation was in force and open to the objection, but who nevertheless shows that he needs for his defense in an enforcement proceeding a determination of the validity of the Regulation as of the time when he is charged with having violated it. Paragraph (1) of § 204 (e) provides[1] that

sidered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court."

[1] Section 204 (e) (1) of the Act reads as follows:

"Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting

within the periods of time which it stipulates, a defendant in any criminal proceeding involving an alleged violation of a regulation may apply to the court in which the proceeding is pending, for leave to file in the Emergency Court of Appeals a complaint setting forth objections to the validity of any provision which the defendant is alleged to have violated. It is further provided that the court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with § 203 (a).

Inasmuch as the Stabilization Extension Act of 1944 was not enacted until after petitioners filed their protest with the Price Administrator, the effect of the Court's decision is to say that prior to the effective date of the Stabilization Extension Act of 1944 the Price Administrator at any time, without any notice, could obstruct the right of judicial review by "correcting" an invalid regulation which had not been protested prior to its "cor-

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forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection."

rection", in spite of the fact that subsequent to such "correction" the Administrator had caused the indictment of persons whose alleged violations occurred prior to such "correction".

The provisions of § 204 (e), added by the Stabilization Extension Act, afford no absolute right of judicial review. The review therein provided lies in the discretion of the court before whom the enforcement action is pending. In this case and in similar cases there is the hazard of the possible refusal of the District Court to authorize the filing of a complaint or to permit all objections to be heard. Petitioners assert that to be subjected to such hazard is to be deprived of due process of law.

II.

BASIS OF JURISDICTION

The judgment of the Emergency Court of Appeals sought to be reviewed was entered on March 27, 1945. The jurisdiction of this Court is invoked under § 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. App § 924(d).

III.

SPECIFICATION OF ERRORS TO BE URGED.

The Emergency Court of Appeals erred in the following respects:

1. In refusing to consider whether, and in refusing to declare that, the Regulation protested was invalid during the period July 16 to September 11, 1943.

2. In holding that the Price Administrator was not required to determine whether the Regulation was invalid during the period July 16 to September 11, 1943.

3. In holding that the Emergency Price Control Act prohibits the filing of a protest against a regulation after the claimed ground of invalidity has been "corrected or cured".

4. In holding that the Emergency Court of Appeals is not required to review the denial of such a protest.

5. In holding that a protest filed under § 203 of the Act, prior to the enactment of § 204(e)(1), is affected by the provisions of the latter subsection.

6. By holding that in the case at bar petitioners are afforded due process of law by the provisions of § 204 (e)(1) of the Act.

7. In construing the Act so as to leave it within the discretion of the District Court as to whether or not petitioners should be forced to trial under an *ex post facto* law.

IV.

QUESTIONS PRESENTED

1. Although the Regulation in question was validated, prospectively, before the protest was filed (but after the dates upon which petitioners are alleged in the indictment against them to have violated it) the first question presented is: *Did the Emergency Court of Appeals erroneously deny to the petitioners the right to have their protest considered on the merits under §§ 203 and 204 (a) of the Emergency Price Control Act, considering that the language of the Act imposed no time limitation upon the filing of the protest?*

2. Since the protest was filed prior to the enactment of the Stabilization Extension Act of 1944, which added §§ 204 (e)(1) to the Emergency Price Control Act, the second question presented is: *Is the legal status of the*

protest in any way affected by Section 204 (e)(1), and did the Emergency Court of Appeals erroneously hold that petitioners could assert the claimed ground of invalidity of the regulation only in a proceeding instituted pursuant to § 204 (e)(1)?

3. Since the review provided by § 204 (e)(1) lies in the discretion of the District Court before whom the indictment and civil enforcement action is pending, and is not available as a matter of right, the third question presented is: *In the case at bar, has the construction given §§ 203 and 204(a) of the Act by the Emergency Court of Appeals deprived petitioners of due process of law by denying to them, as a matter of right, administrative consideration of their protest and judicial review thereof on the merits by the Emergency Court of Appeals?*

4. Since the Emergency Court of Appeals has refused to consider, on the merits, whether the Regulation in question was not validated until after the dates of alleged violations specified in the indictment, the fourth question presented is: *Are not petitioners being subjected to prosecution under an ex post facto law, in violation of the constitutional prohibition against such laws?*

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Emergency Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question is one of public importance because it involves the interpretation of statutory procedural provisions which affect the constitutional rights of many people.

That the construction of the Act by the Emergency Court of Appeals countenances deprivation of due process, is illustrated by the following situation, analogous to the one in the case at bar:

(a) The Administrator may promulgate an invalid regulation.

(b) After the regulation has been extant for a period, he may validate it prospectively.

(c) After thus validating the regulation, he may cause a person to be indicted for violations alleged to have occurred during the period when the regulation was invalid.

(d) After the return of the indictment, he may refuse to entertain a protest then filed and directed against the regulation during the period when it was invalid, notwithstanding that there is no time limitation imposed by the language of the Act upon the filing of the protest.

(e) The protestant may, in the discretion of the District Court, be forced to trial under the indictment and be wholly denied an opportunity to have the invalidity of the regulation established by a judgment of the Emergency Court of Appeals, and also be precluded from asserting as a defense in the criminal trial the regulation's invalidity during the period when allegedly it was violated.

The foregoing situation may eventuate under the interpretation given the Act by the Emergency Court of Appeals, notwithstanding that there is nothing in the language of the Act which so limits the protest and review procedure. This is such a denial of a reasonable opportunity to be heard as to constitute an offense against the due process clause of the Constitution. Since the language of the Act does not require an interpretation leading to this result, this Court should interpret the Act so as to avoid an unconstitutional construction.

A further evil results from the construction made by the Emergency Court of Appeals. The situation outlined above, if it eventuated, might result in criminal penalties being imposed pursuant to a regulation *validated after* the violations are alleged to have occurred. Such a construction is in conflict with the constitutional safeguards against *ex post facto* laws.

The construction made by the Emergency Court of Appeals is in conflict with the reasoning of this Court in *Yakus* v. *United States*, 321 U. S. 489, 64 S. Ct. 660 (1944). The holding in the *Yakus* case was predicated upon the proposition that the administrative procedure provided by the Act (prior to its amendment by the Stabilization Extension Act of 1944) was fully adequate to a defendant in a criminal case, provided he filed a protest within the applicable time limit provided by the Act. This Court indicated that the decision would be otherwise if it should appear that the manner in which the statute was being administered deprived a defendant in a criminal case, who had filed such a protest, of an adequate opportunity to establish the invalidity of the regulation allegedly violated by him. The construction of the Act made by the Emergency Court of Appeals cannot be sustained without making the Act vulnerable to the grave constitutional objections which were disposed of in the *Yakus* case.

Further reasons here urged for the allowance of the writ may be stated in the language of the dissenting opinion of Judge Laws:

> "I do not agree with the interpretation of the Court that the protest procedure was created by Congress to provide relief against future controls of prices, to the exclusion of other rights and liabilities of individuals. Such rights and liabilities might be of importance equal to, if not greater than, the right to be relieved of price controls. Frequently, a regulation has

interfered with and has stricken down contracts affecting a protestant. In some instances, as in the case before us, enforcement proceedings, in the form of indictments for criminal violation of a regulation, suits to impose treble damages and suits for injunction, have been brought and are pending against a protestant. This Court is in the only forum in which the invalidity of the regulation may be established. If not established in this Court, the possible effect of the invalidity of the regulation upon the rights and liabilities of the protestant may not be passed upon in other courts. The right to protest and obtain judicial review of regulations and orders issued by the Administrators was given for the benefit of individuals. I cannot believe Congress intended to give such benefit in respect only of future controls of prices and exclude the right to protest against past controls which might vitally affect rights and liabilities of individuals. I find nothing in the language of the Emergency Price Control Act of 1942 which so limits the protest and review procedure."

* * * * *

"As I read the opinion of the Court, there is no question but that the right to protest exists except where it has been cut off by a change in the regulation before the protest is filed. The Court seems to indicate that thereafter a filing of a protest is 'untimely'. I disagree with this construction of the Act for several reasons. First, as stated by this Court in *Schanzer* v. *Bowles*[2], there was no time limitation fixed by the Act upon the filing of a protest based on grounds arising, as in this case, more than sixty days after the issuance of a regulation. The majority opinion of the Court, however, has now introduced a new bar to complainant's protest, a bar of which they had no notice from the language of the Act. This bar may be raised at any time, without any notice, by one of the parties to the litigation. Second, the construc-

"2. 141 F. 2d 262 (E. C. A. 1944)."

tion completely obstructs the right of judicial review, in spite of the existence of substantial rights dependent upon such review[3]."

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the United States Emergency Court of Appeals, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that said judgment of the United States Emergency Court of Appeals may be reversed by this Court and the cause be remanded, and for such further relief as to this Court may seem proper.

Dated April 25, 1945.

CLAUDE A. ROTH,
Attorney for Petitioners.

CUMMINGS AND STANLEY,
DAVID L. BAZELON,
JACK H. OPPENHEIM,
JACK JACOBS,
Of Counsel.

"3. It is no answer to state, as the Court does that the provisions of the Stabilization Extension Act provide some right of review in the enforcement action. Such review lies in the discretion of the judge before whom the enforcement action is brought; it is not available as a matter of right. But the important point is that it did not exist under the original Act with whose interpretation we are here concerned."